80-2029

No.

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In the Supreme Court of the United States

October Term, 1980

ALLEN N. BRUNWASSER,

Petitioner

v.

JUDGE EUGENE B. STRASSBURGER, III; ALEXANDER UNKOVIC, ESQUIRE; GRACE S. HARRIS, ESQUIRE; JOSEPH L. COSETTI, ESQUIRE; CARL E. GLOCK, JR., ESQUIRE; CHARLES C. KELLER, ESQUIRE; HERBERT MARGOLIS, ESQUIRE; CHESTER H. BYERLY, ESQUIRE; THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA; ALLEN B. ZERFOSS, ESQUIRE, Chief Disciplinary Counsel; and EDWARD A. BURKART, ESQUIRE, Assistant Disciplinary Counsel

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ALLEN N. BRUNWASSER
Petitioner

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Question Presented for Review

(A) THE QUESTION PRESENTED FOR REVIEW IS:

Should the Federal Court policy to abstain when a lawyer is disciplined by the state court which gave him his license be extended to include a proceeding where the lawyer produced prima facie evidence of improper prosecutorial and judicial conduct which might have infected the lawyer's Fifth and Fourteenth Amendment right to a fair and unbiased trial plus review and the state court system refuses to provide a remedy to explore this?

(B) THE LIST OF PARTIES is contained in the caption of this petition to review the decision of the United States Court of Appeals for the Third Circuit.

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(D) OPINIONS BELOW:

The opinion (25a) of District Judge Maurice B. Cohill, Jr. is unreported. The judgment order of the Court of Appeals, which filed no opinion, is reported in 642 F.2d 440. (48a).

(E) THE GROUNDS FOR JURISDICTION ARE:

(i) The February 13, 1981 judgment order of the Court of Appeals was entered on February 13, 1981.

(ii) Petitioner's motion for F.R.A.P. 35 hearing en banc and for F.R.A.P. 40 reargument was denied April 3, 1981. No extension to petition for certiorari was requested or granted.

(iii) No cross-petition for certiorari has been filed.

(iv) Jurisdiction to review the judgment of the United State Court of Appeals for the Third Circuit is conferred by 28 U.S.C. 1254 (1).

(F) CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

Petitioner relied upon 42 U.S.C. 1983, 1985, 1986; 28 U.S.C. 1331, 1343(3), 2254, 2201, 2202; 18 U.S.C. 241, 242, 371 and the First, Fifth, Eighth, Ninth and Fourteenth Amendments to the constitution of the United States.

Petitioner has reproduced the text of this material in his appendix beginning at p. 1a.

(G) CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED:

In the United States District Court for the Western District of Pennsylvania, where petitioner filed his suit, he relied upon the First, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution plus 42 U.S.C. 1983, 1985, 1986; 28 U.S.C. 1331, 1343(3), 2254, 2201-2202 and 18 U.S.C. 241, 242, 371 for jurisdiction.

Petitioner is a 1948 graduate of the Harvard Law School. He was admitted to practice by the Supreme Court of Pennsylvania on April 6, 1950.

His active, practice, which included many controversial front-page cases resisting government, extended to thirteen states and many Pennsylvania jurisdictions.

This petition is the final effort to resist an informal reprimand which is the sole discipline he has ever received.

The seed of petitioner's discipline problems began when he resisted a City of Pittsburgh business privilege tax to which he objected because government-oriented lawyers and their professional associates were treated differently than non-government lawyers.

But the case did not really move forward until his discipline proponents, against whose federal class action fee he successfully objected, retained as their personal attorney the Chairman of the State Disciplinary Board.

Statement of the Case

Petitioner was charged with four disciplinary offenses.

A. On October 20, 1973, Grace S. Harris, Esq. (Harris), a member of the City of Pittsburgh (the City) tax collection team, which also included Eugene B. Strassburger, III Esq. (now a Court of Common Pleas of Alleheny County Judge), D. R. Pellegrini, Esq. (Pellegrini), and Joseph L. Cosetti, Esq. (Cosetti) (then City Treasurer, but now a Western District Bankruptcy Judge), complained to the Disciplinary Board Prosecutor that Petitioner had filed a preliminary objection to a rule to show cause, joined equity and trespass in the same summons in the tax case, threatened with undisclosed sanctions a clerk who had entered against Petitioner at her insistence a default judgment in direct violation of her on record stipulation and being some how responsible for the clerk's failure to enter on the Prothonotary's docket the filing of a praecipe to present a warrant of attorney which had admittedly been properly served.

Petitioner does not have space within the thirty-page rule limit to detail the procedural history of these cases except to state that ultimately Common Pleas Court of Allegheny County, Civil Division, Chief John P. Flaherty (now a Pennsylvania Supreme Court Justice) enjoined City tax collection efforts represented by that litigation and in favor of Petitioner on that issue.

B. Shirley Kronzek (Kronzek) discussed a City related water problem with Harris who also sat on the City Water Assessors' Board.

Around that time, and on January 19, 1977, she complained to the Disciplinary Prosecutor that Petitioner

refused to turn over to her checks in a total amount of $750 because he had been given not sufficient fund checks which she refused to pay on the same matter and was asserting a *Greek Catholic Union v. Russin,* 1940, 340 Pa. 295, attorney's lien.

Kronzek also filed a civil suit on the same problem. At a September 25, 1978 trial, where Kronzek was represented by a lawyer of her choice, Judge N. P. Papadakos (now Chief Judge of the Allegheny County Common Pleas Court, Civil Division) ruled in favor of Petitioner and against Kronzek.

C. When Harris and Cosetti attempted to remove everything in Petitioner's law office and record it for public amusement by cooperating with television media people then on the scene, Petitioner filed a claim that lease provisions with his landlord created a sale-preventing lien.

Petitioner had been told by the solicitor for the Prothonotary, who had issued this writ of execution, that both he and the Sheriff's solicitor had concluded the proceeding issued in the said default judgment was illegal so that the sale was not to be held.

However, without prior notice, and while Petitioner was engaged in trial, the sale was set and would have left Petitioner with a bare-to-the-walls office if he had not filed the claim.

Judge Flaherty finally enjoined this proceeding.

D. On January 31, 1978, the fourth charge was issued in Pellegrini's complaint that Petitioner should be disciplined for protecting the files, records, books and furnishings in his law office.

In sum, Petitioner was the prevailing party in the actual court cases but the losing party in the collateral discipline matter which involved the identical facts.

Petitioner requested over and over an opportunity to challenge the method by which lawyers were chosen to sit in judgment and, in particular, how his three-attorney hearing committee was selected, plus what impact, if any, resulted from Alexander Unkovic (Unkovic) being both Chairman of the Supreme Court Disciplinary Board and the personal legal representative of the proponents of discipline.

But there was no procedure to do it. Petitioner also wanted to make inquiry about how secret pre-formal charge action by two successive Pennsylvania Chief Justices, the then President of the State Bar Association and Unkovic might have affected the intermediate and final outcome of his case.

But there was no procedure to do it.

At his pre-trial conference, Petitioner discovered for the first time, by examination of the administrative file, that Harris had been corresponding with then Chief Justice B. R. Jones and later Chief Justice Michael J. Eagen, who subsequently made the final decision in the state system.

These chief judicial officers had been also corresponding with the Discipline Prosecutors about why the case was not going ahead.

Chief Justice Eagen's letter of October 6, 1977 advised the Chief Prosecutor, whom he could remove at will: "Mrs. Harris seems to have good reason to complain."

None of this material was sent to Petitioner as D.R. 7-110(B) (2) mandates (13a). When Petitioner asked for copies, Chief Justice Jones, then retired, declined to answer his letter and the Chief Justice Eagen ordered they not be supplied.

With no procedure to overcome this Court constructed obstacle, Petitioner solved the problem by service of a subpoena duces tecum upon Unkovic, who it turned out, had much of it in his personal office files.

These files also disclosed that Harris, Carl E. Glock, Esq., a senior member of the largest Pittsburgh firm and the review officer on three of the charges, plus Unkovic had cooperated to move the charges along.

1. Glock had served as review officer in three of the four charges and recommended prosecution.

What he had said was discovered at the pre-trial conference. Petitioner's conclusion from reading his report is that if another member of the Bar was the target that he would dismiss. But, for Petitioner, he recommended the charges be filed.

However, he then withdrew from the third charge because of an undisclosed conflict between his law firm and Petitioner but left his papers in the file where they were available to the new review attorney who recommended prosecution without further comment.

2. But the charges did not move until Harris sent an August 7, 1977 letter to Glock.

Glock then sent a letter to J. C. Ostrow, former Discipline Board Chief, who sent it on to Unkovic, who had

been hired as Strassburger's personal attorney on July 15, 1977 and was now Chief of the Pennsylvania Supreme Court Disciplinary Board.

3. Unkovic, on August 15, 1977, sent the material on to the Chief Prosecutor, who he could remove at will, with the under the circumstances surprising comment, "I have no idea what her complaint is, but assume you would wish to follow this through."

He also advised she was active in the Bar Association and had been a judicial candidate.

The Chief Prosecutor got the message and filed formal charges October 17, 1977 on these complaints going back to October 20, 1973.

At the evidentiary hearing, Strassburger told the hearing committee about the horrors which follow joining equity with trespass in one summons.[1]

Cosetti, at Petitioner's trial, admitted he had placed undisclosed pressure on the Prosecutor, the Supreme Court Administrator, plus Glock and complained, without success, to the entire assembled Allegheny County Bar Association Ethics Committee.

When Unkovic responded to Petitioner's subpoena, he refused to answer if he had discussed Petitioner's discipline problem with Strassburger even though specifically ordered to speak to the subject by the hearing committee.

It should be remembered that Strassburger was a discipline proponent, a hearing witness, and also had re-

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[1] When he sat as a Judge, his similar ruling in an actual case was reversed. See *Rosenberg v. Rosenberg*, 1980, —— Pa. Superior Ct. ——, 419 A.2d 167.

tained Unkovic as his private counsel on July 15, 1977 to represent him in a class action fee request to which Petitioner, a class member, had objected.[2]

Petitioner's attempts to have an evidentiary hearing about how the above might have affected the outcome of his case were blocked by a stone wall.

Petitioner also objected to and attempted over and over to have an evidentiary hearing so he could challenge the Bar Association orientation of the hearing committee members and review officers.

But there was no vehicle available.

He also complained that the three out of Allegheny County hearing committee members, of whom he had never heard before, convicted him of unmade charges unsupported by record evidence, all in violation of *In re Ruffalo*, 1968, 88 S.Ct. 1222, 390 U.S. 544.

He asked for an evidentiary hearing to ask them how they found out about dehors record alleged misconduct.

This request, made at each available state, was similarly rejected.

In sum, at least in this case, there is no Pennsylvania procedure to test judicial bias or factors that may contribute to an unfair hearing.

The hearing committee recommended public censure by the Supreme Court plus supervision and probation for an unlimited period.

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[2] The objections resulted in a settlement in which Strassburger took a very substantial reduction and caused a new District Court policy of appointing a trustee ad litem to protect the class from the fee seeking class lawyer.

But the Disciplinary Board rejected this punishment and substituted an informal reprimand instead.

Although the Supreme Court (*Office of Disciplinary Counsel v. Herman*, March 9, 1981, Pa. , 426 A. 2d 101, 102, f.n. 3) has said, without exception, that "the scope of this Court's review is de novo as to both the findings and the recommendations of the Disciplinary Board, Pa. R.D.E. 208 (e); Matter of Green, 470 Pa. 164, 368 A.2d 245 (1977)" Petitioner's request for appeal, briefing and oral argument was refused by Chief Justice Eagen on April 26, 1979 and May 10, 1979 and Petitioner ordered to appear for his Board private reprimand.

After the United States Supreme Court refused certiorari (100 S.Ct. 147), Petitioner filed his complaint in the United States District Court for the Western District of Pennsylvania, where it was dismissed for lack of jurisdiction and collateral estoppel by District Judge Maurice B. Cohill, Jr., whose opinion and past opinion orders have been attached as an appendix to this petition (25a).

Neither Judge Cohill nor the affirming without opinion Court of Appeals for the Third Circuit have discussed the issue of lack of state procedure to test bias and an unfair hearing in the state system.

Petitioner's lack of a state remedy has thus been overlooked or sub silento approved by all courts to whom it has been presented.

(H) ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I. Petitioner's attempt to explore the bias which might infect his right to a fair and impartial trial began with the Disciplinary Prosecutor who decided whether to process the various charges and ended with the two Chief Justices who were empowered to make the ultimate decision whether or not to allow full Pennsylvania Supreme Court review which would include briefing and oral argument.

A. D.R. 8-102(B) directs: "A lawyer shall not knowingly make false accusations against a Judge or other adjudicatory officer."

1. Pennsylvania Rule of Disciplinary Enforcement (R.D.E.) 203(c) advises "The Board, its hearing committees, and (when administering informal admonitions) Disciplinary Counsel are 'tribunals' within the meaning of the Disciplinary Rules."

2. Due process impartiality covers both the "tribunal" and, to a somewhat lesser degree, the Prosecutor as well. *Marshall v. Jerrico Inc.*, 1980, 100 S.Ct. 1610, U.S. .

3. Petitioner is well aware of the professional and other dangers when a lawyer talks about "tribunals". *Garrison v. Louisiana*, 1964, 85 S.Ct. 209, 379 U.S. 64 (criminal libel conviction, after district attorney talks about judges, reversed); *Gately v. Sutton*, 1962, C.A. 10,

310 F.2d 107 (lawyer who says Chief Justice was bribed disbarred without opportunity to prove it); *Goodwin Motor Corp. v. Mercedes Benz,* 1980, 172 N.J. 263, 411 A.2d 1144 (lawyer has duty not to risk violation of disciplinary rules).

B. Without Pittsburgh, Pennsylvania orientation, the Supreme Court might not be able to evaluate the persons who participated in this disciplinary case. So, Petitioner will describe some of them briefly here.

1. B. R. Jones was a Chief Justice of Pennsylvania during part of the period Petitioner was under investigation. He retired shortly before his 21 year term of office ended, so he could join a prestigious Philadelphia law firm. But, he is now deceased.

2. Michael J. Eagen was a Justice of the Supreme Court who succeeded to Chief Justice when Chief Justice Jones retired. He has recently resigned shortly before the end of his term of office.

He made the final decisions not to allow Pennsylvania Supreme Court de novo review of this case when he directed on April 26, 1979, at No. 224 Disciplinary Docket No. 1, that "it is hereby ordered that Allen N. Brunwasser, Esquire, be privately reprimanded by the Disciplinary Board of the Supreme Court of Pennsylvania pursuant to Rule 204 of the Pennsylvania Rules of Disciplinary Enforcement" and denied oral argument on May 10, 1979.

3. Alexander Unkovic, Esq., was appointed Chairman of the Disciplinary Board by the Chief Justice of Pennsylvania in 1977 and served until April 1, 1979.

This covered the period when the Pennsylvania Bar Association entered the picture and the day the Disciplinary Board advised Chief Justice Eagen that Petitioner would not voluntarily submit to an informal reprimand (March 14, 1979).

(a) The Pennsylvania Supreme Court appoints the Board and its Chairman (R.D.E. 205(a)) who manage the entire system including selection and discharge of the Prosecutor and his staff (R.D.E. 205(c)(2)), hearing committees (R.D.E. 205(c)(3)) and lawyers who review in the first instance the Prosecutor's decision to prosecute (R.D.E. 205(c)(5)) (14a-15a).

> "The Board shall, to the extent it deems feasible consult with officers of local Bar Associations in the counties affected concerning any appointment which it is authorized to make under these rules"

(R.D.E. 205(c)(1)), and assigns the review member plus the hearing committee "through its secretary" to each case (R.D.E. 205(c)(4)). Board Rules 93.23(b) and 93.23(a)(4) say the same thing (18a).

But, as a practical matter, administration is relegated to the Chairman.

4. At the time of these discipline events, Eugene B. Strassburger, III was a discipline proponent and a hearing witness against Petitioner.

He also served as Deputy City Solicitor but is now a Judge.

When Petitioner, a class member, objected to his requested fee in a class action in the United States District Court for the Western District of Pennsylvania C.A.

72-968, he hired Unkovic on July 15, 1977 as his personal attorney and later paid him $6,000 out of class funds.

Shortly after retention, Unkovic filed two formal pleadings attacking Petitioner's ethics.

Petitioner's District Court formal objection to Unkovic serving both as Strassburger's counsel and State Disciplinary Board Chairman resulted in his voluntary withdrawal as federal court case counsel on October 11, 1977.

The Court is asked to recall that Petitioner's subpoena duces tecum disclosed that Unkovic's files contained not only previously unknown to Petitioner communications from Harris and two Chief Justices inter se and to various Board officials, but also written evidence of his participation with Bar Association President Glock and Harris (August 3, 1977 to August 15, 1977) and his direction to Chief Prosecutor Zerfoss to "follow this through".

Although directed by the hearing committee to respond to Petitioner's questions about whether he had discussed Petitioner's discipline problems with Strassburger, Unkovic refused and the committee decided not to do anything about it.

Unkovic had also been a Pennsylvania Bar Association President.

5. Carl E. Glock, a senior member of Allegheny County's largest law firm, served as review officer on three of the four charges.

He recommended prosecution on all but withdrew on the Kronzek matter without removing his evaluation from the file where his replacement could read it.

These documents are usually secret and Petitioner was indeed lucky to get to read them. Mr. Glock said, inter alia, on July 7, 1976 that "the entire matter began in March, 1971, when the City of Pittsburgh, through its counsel, the complainant, initiated suit to collect delinquent business privilege taxes. . ."

Petitioner has never to this day met Mr. Glock or had a case with him. However, this lawyer said that evidence insufficient against others was sufficient against him. He explained;

> "In my opinion, as discussed more fully below, respondent's well documented conduct in the Pittsburgh business privilege tax litigation, standing alone, barely supports the filing of formal charges. However, respondent's general reputation for harassing tactics, which is confirmed by examples appearing in the file, suggests that a stronger case based on additional similar conduct exists."

But, this "additional similar conduct" was neither identified nor disclosed.

Mr. Glock participated as counsel for Mellon Bank, N.A. in its resistance to the same City business privilege tax. The case is reported at 488 Pa. 544, 412 A.2d 1366 (1980).

Mrs. Harris also protested Mr. Glock's unethical conduct in that case. But, he never had to face professional charges.

Petitioner's attempt to show the hearing committee that Glock, Unkovic, Strassburger, Harris and Pellegrini had engaged in conduct no better than his was rejected even though the actual case files were present at the hearing and could be easily examined.

C. Petitioner asked for an evidentiary hearing about how the hearing committee was selected, what part the Chief Justices and Unkovic played in the case and how the hearing committee found him guilty of charges unmade and unproven at any time.

This effort, made at every available stage, was on each occasion rejected with a denial but no hearing.

Petitioner's December 12, 1977 request, when the hearing committee was appointed was rejected on January 6, 1978.

His February 13, 1978 renewal, when the fourth charge was filed, was again denied.

His September 29, 1978 request to the Disciplinary Board was rejected again, as was the request made to them in his October 27, 1978 brief on exceptions.

The Pennsylvania Supreme Court denied de novo review as did the United States Supreme Court on October 1, 1979 at No. 79-254 where Petitioner raised the issue in Question No. 4.

Petitioner has also been unsuccessful in this specific area both in the District Court and the Court of Appeals.

D. What harm could follow permitting Petitioner to ask Mr. Unkovic if the case was fixed or improperly influenced? All he would have to do is deny it.

However, Pennsylvania not only has no vehicle to explore Fifth and Fourteenth Amendment bias, but the controlling Supreme Court and Board Rules will not allow it.

1. After Board Secretary, Nan M. Cohen, received Petitioner's first bias exploration request, she told the hearing committee in a December 20, 1977 letter:

> "The Pennsylvania Rules of Disciplinary Enforcement do not provide for pleadings other than a petition for discipline and an answer thereto."

2. Disciplinary Rule 208 (b) and (c) not only make no provision for what Petitioner had requested, but prevent it by directing " (c) (1) proceedings before the hearing committees shall be governed by the Board Rules. . ."

Board Rule 89.1 (a) rejects procedural attacks and conclusively presumes everything done under Chapter 87 preformal complaint procedure, including protections against a lawyer being overreached, is all right.

Petitioner will attempt to have the Disciplinary Board send the Court sufficient copies of this material so all of it will be available for close examination.

II. Petitioner, a lawyer who has succeeeded without political, family or Bar Association influence, has been disciplined for charges that constitutes, at most, procedural misjudgments for which he relied on reported case authority.

Harris, plus Strassburger and Cosetti, now respectively state and federal judicial officers, have been, and

still are, being represented, with specific approval of the Mayor, by the tax-supported City Law Department.

Cosetti's Bankruptcy Judge appointment was strongly and enthusiastically recommended both to the Pennsylvania Western District federal Judges and the media by the same Judge Cohill, who dismissed Petitioner's case as frivolous and an abuse of process, after he had been asked to recuse.

A. Petitioner had both case law plus conduct of his opponents to support what he did in his own defense.

He really believed, and nothing of record showed he did not, what was said in *Maness v. Meyers,* 1975, 95 S.Ct. 584, 595, f.n. 7 and 16, 419 U.S. 449, 459, 467, f.n. 7 and 16 (A.B.A. Courage and zeal mandates will protect even lawyer's farfetched and untenable ideas if presented in good faith[3].)

No one has yet specifically told him he owes himself less than he must give to his clients. *In the Matter of Little,* 1972, 92 S.Ct. 659, 404 U.S. 553, or that his quasi-criminal disciplinary proceeding, *In re Ruffalo,* 1968, 88 S.Ct. 1222, 1226, 390 U.S. 544, 551, will be processed or decided on different standards. *Raley v. Ohio,* 360 U.S. 423, 437-438, 79 S.Ct. 1257, 1265-1266 (commission which advises witness he has previlege not to answer can't convict him for taking the advice); *Cox v. Louisiana,* 379 U.S. 559, 85 S.Ct. 476 (person told by police that he can demonstrate "near" Court House can't be punished for believing him); *U. S. v. Caceres,* 1979, 440 U.S. 741,

[3] Petitioner's conduct was not, in his opinion, unusual so that he did not need the full protection of these cases.

753, f.n. 15, 99 S.Ct. 1465, 1472, f.n. 15, and cases collected.

Petitioner respectfully suggests this new idea of disciplinary retrial of a court victorious but politically disadvantaged opponent has set a dangerous precedent which should be overruled here. *Powell v. McCormick,* 1969, 89 S.Ct. 1944, 1969, f.n. 60, 395 U.S. 486, 531, f.n. 60.

B. The charges which began with the Harris October 20, 1973 complaints against her tax case opponent, did not move until two successive Pennsylvania Chief Justices, two state Bar Association Presidents, and a lawyer who served at the same time as state Disciplinary Chief and counsel for a disciplinary proponent put on the heat.

1. If this were a case about the most atrocious and unjustified homicide, regular constitutional protections against unfair bias would both apply and afford the evidentiary hearing which has been denied here.

If discipline machinery has been unconstitutionally saturated with non-representative, non-legal community bar association chiefs against Petitioner, who does not belong to any bar association, what valid objection could be raised to his request that the problem be examined just like any other similar male-female, Black-White, or rich-poor challenge? *Duren v. Missouri,* 1979, 439 U.S. 357, 363, 99 S.Ct. 664, 668; *Taylor v. Louisiana,* 1975 419 U.S. 357, 363.

What reason is there for not giving to a lawyer, who is part of the justice system, the same protective procedures as those who are also processed by it?

If Petitioner can't prove his case, that is the end of it and his objections will be laid to rest.

If he can't show his informal reprimand was infected by unconstitutional overreaching, not only he, but the public and the Court can rest undisturbed.

Sometimes, even a casual request or inquiry can have grave impact when made by a powerful superior to his removable-at-will subordinate. *U.S. ex rel. Accardi v. Shaughnessy,* 1954, 347 U.S. 260, 74 S.Ct. 499.

If fair-on-the-surface state Chief Justices are secretly serving as secret prosecutors, what could possibly be wrong with exposing and ending the practice?

In sum and in light of all the judicial and lawyer time that has been expended in this case, would not a more efficient procedure have been the granting of the evidentiary hearing where Petitioner could ask Unkovic if he, or anyone to his knowledge, did anything behind the scenes to influence the unique result in this case?

Would it be improper to ask a Chief Justice why he interfered here but not in other cases or to inquire of the Prosecutor whether any outside pressure influenced his decision to revive a dead case?

What would be wrong in asking the hearing committee who told them about the uncharged and unproven libels they talked about in their opinion?

2. When a state provides no vehicle to test jury prejudice, its criminal conviction will be vacated on direct appeal. *Groppi v. Wisconsin,* 1970, 400 U.S. 505, 511, 91 S.Ct. 490, 494; *Ham v. South Carolina,* 1973, 409

U.S. 524, 527, 93 S.Ct. 848, 850 (civil rights activist who says police are framing him denied existing voir dire remedy).

3. Federal Courts have mandated a 28 U.S.C. 22-54(e) evidentiary hearing if "for any reason it appears that the state trier of fact did not afford the habeas corpus applicant a full and fair fact hearing."

4. The right to an impartial tribunal is so firmly engrained in American Jurisprudence that Appellant respectfully suggests even a lawyer charged with poor ethics should at least have this protection. *Marshall v. Jerrico, Inc.*, April 28, 1980, 100 S.Ct. 1610, 1613 (allowed discovery does not produce sufficient facts to apply impartial civil and criminal and "appearance of justice" rule to employment standards administrator); *Gibson v. Berryhill*, 1973, 93 S.Ct. 1689, 1696-7, 411 U.S. 564, 575-78 and f.n. 14 (bias and no state remedy are exceptions to Younger abstention); *Vitek v. Jones*, March 25, 1980, 100 S.Ct. 1254, 1264 (state transfer of convict to mental hospital requires "an independent decision maker"); *Meyers v. Alldridge*, 1974, C.A. 3, 492 F.2d 305 (prisoner discipline requires fair hearing officer); *Goldberg v. Kelly*, 1970, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022 (welfare termination hearing requires "impartial decision maker"); and *In re Schlesinger*, 404 Pa. 584, , 172 A.2d 835, 840 (attorney discipline due process requires "full, fair and impartial hearing."); *Rosco v. Pagano*, N.J., 406 Fed. Supp. 1364, 1369 (Younger doctrine not applied to state police discipline when right to fair hearing involved; hearing officer removed and state case stayed pending replacement); *Rite Aid Corp. v. Board of Pharmacy of State of New Jersey*,

1976, 3 Judge Court, 421 Fed. Supp. 1161, 1169 (court orders depositions and uses them in determination of no bias); *Friedman v. Rodgers,* 1979, 99 S.Ct. 887, 898; *Pacific Telephone and Telegraph Co. v. P.U.C. of Cal.,* August 13, 1979, 100 S.Ct. 1, 3 (Mr. Justice Rehnquist denies stay when no *Gibson v. Berryhill* type of bias is alleged).

5. Although assured of his first class citizen status in other areas, *Spevack v. Klein,* 1967, 385 U.S. 511, 516, 87 S.Ct. 625, 629, a lawyer in the disciplinary machinery soon discovers that constitutional defenses and procedures he could routinely raise with success for a client are not available to him.

This is because of "sound policy reasons tied to the unique and peculiarly state oriented function attorney disciplinary proceedings serve." *Mildner v. Gulotta,* 1975, 405 Fed. Supp. 182, 198, aff'd per curiam, 1976, 96 S. Ct. 1489, 425 U.S. 901, and ". . . the special relationship between state Courts and members of their bars", *Gibson v. Supreme Court of New Jersey,* 1977, C.A. 3, 558 F.2d 701, 704.

In fact, the Commonwealth Court of Pennsylvania has recently observed that "voir dire is not available to test members of administrative bodies engaged in adjudicating issues committed to their decision." *Graham v. Mars Area School District,* 52 Pa. Commonwealth Ct. 116, 118, 415 A.2d 924, 926, even though it is vital to due process.

6. Petitioner respectfully suggests there is a serious constitutional tension between a lawyer's obligations as expressed in *Maness,* supra, plus *Anders v. California,*

1967, 386 U.S. 738, 87 S.Ct. 1396, and the actual and real policy to uphold court authority, at any cost, when the lawyer is on the other side.

7. Petitioner does not challenge the power of the elected court to control his conduct as its officer and functionary.

He appreciates his privilege of holding public office without having to run for election as the judges do.

He accedes to doing what he is told and paying the price if he doesn't.

But he respectfully objects to being told retroactively and by a procedure where the result might have been determined before it began.

Petitioner has been restrained in what he would like to say. He respectfully suggests he has established at least a sufficient prima facie basis for the bias testing evidentiary hearing he has not been able to enjoy.

III. There is no collateral estoppel against federal relief because the bias issue has not been decided after a "full and fair hearing" anywhere in the state system.

A. Petitioner respectfully suggests that Judge Cohill should not have decided this case after he was asked to recuse and on the limited state record represented by the complaint and respondent's motions to dismiss.

1. Cosetti obtained his law degree and was admitted to the Bar while still City Treasurer.

He had little legal experience generally and absolutely none in bankruptcy.

He had recently run as a sacrifice Republican candidate for City Mayor against then popular Pete Flaherty, who was reelected in a landslide.

When Petitioner read that he was the recommended appointee by a three judge committee chaired by Judge Cohill, who had also been a Republican and actually gave a media release about how fortunate the public was to have Cosetti available, he objected to the appointment and asked Judge Cohill to recuse in this case.

2. But, the Judge declined and then went on to observe that Petitioner's case, which he was at the same time dismissing, was "the kind of repetitious, vexatious, and wasteful litigation feared by both the Supreme Court and the Third Circuit."

But, Judge Cohill makes no comment upon the numerous spurious discipline cases started by the Discipline Prosecutor and eventually dismissed, including one brought by an Unkovic client and one actually solicited by the Prosecutor himself.

3. Judge Cohill did not have the state record or the testimony so Petitioner respectfully suggests he should not and could not have made that observation. *Batista v. Weir,* 1965, C.A. 3, 340 F.2d 74, 81; *Kauffman v. Moss,* 1970, C.A. 3, 420 F.2d 1270, 1274 and f.n. 6 and 9; *Mussell v. Place,* 1876, 94 U.S. 606, 24 L.Ed. 214, 216, approved, *Sea-Land Services, Inc. v. Gaudet,* 1973, 414 U.S. 573, 593, 94 S.Ct. 806, 819; *Lawler v. Nat. Screen Service,* 1954, 349 U.S. 322, 330, f.n. 20.

B. When the state system foreclosed Petitioner's fair trial and bias issue from proper adjudication, it ex-

cluded application of the judge-made rule of collateral estoppel.

1. The impact of lack of state bias remedy as a limiting factor in the application of collateral estoppel is nowhere discussed in this case.

2. Petitioner understands the diplomacy factors that would cause the Pennsylvania Supreme Court to back up its own disciplinary people. Then Chairman Gilbert Nurick said in 1975 at 79 *Dickinson Law Review,* 549, 553:

> "Our Supreme Court acts expeditiously on such recommendations and, *almost without exception,* has approved the recommendations of the Board." (Emphasis supplied.)

3. *Montana v. United States,* 1979, 440 U.S. 147, 164, f.n. 11, 99 S.Ct. 970, 979, f.n. 11, observed, in applying the doctrine of collateral estoppel to a state tax judgment:

> "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."

and cited *Gibson v. Berryhill,* 411 U.S. 564, 93 S.Ct. 1629; *Trainor v. Hernandez,* 431 U.S. 434, 469, 97 S.Ct. 1911, 1931 (Justice Stevens dissenting); *Restatement of Judgments,* T.D. Sec. 68(1) and 78 *Columbia Law Review,* 610, 640-653.

That learned survey of then available authority excludes a lawyer defendant in a state disciplinary case from the doctrine (78 Columbia L.R. at 648) and says:

> "Where, however, the party is an involuntary litigant in civil proceedings, he does not waive any

objections to the state's rules of procedure. Thus, if the party were an attorney in a judicial disciplinary proceeding defending with the claim that his conduct was constitutionally protected, a federal court may well conclude that a judicial hearing which permitted the court to reject findings of fact made by a referee, without hearing the parties, witnesses, or oral argument, although in conformity with a state statute, failed to provide fair process."

(3) Both the majority and the dissent in *Trainor,* supra, were concerned with adequate state procedural remedies to protect an alleged cheating welfare recipient against summary attachment procedures insofar as abstention was concerned. The majority remanded to insure it existed (431 U.S. at 447 and f.n. 10, 97 S.Ct. at 1920 and f.n. 10). The dissent said abstention was improper "unless the state procedure affords a plain, speedy and efficient remedy for the federal wrong." citing *Gibson v. Berryhill,* and concluded (431 U.S. at 1931, 97 S.Ct. at 469):

> "In my judgment, when a state procedure is challenged, an adequate forum must be one that is sufficiently *independent* of the alleged unconstitutional procedure to judge it *impartially* and to provide prompt relief if the procedure has been pointed to as providing such and where the remedy is 'uncertain', federal jurisdiction exists." (All brief emphasis is author's.)

The recent case of *Allen v. McCurry,* Dec. 9, 1980, 101 S.Ct. 411, U.S. , discusses the doctrine but in a non-attorney discipline area.

4. Every case cited by the District Court in the federal hands-off state attorney discipline policy area excludes lack of fair hearing due process.

(I) CONCLUSION AND REQUEST FOR RELIEF

The best argument Petitioner can make for his good ethics is that these charges are the best that could be brought against him after 32 years of active practice in which he participated in controversial cases against government at all levels and usually with unexpected by his opponents success. Petitioner is not unaware that the Pennsylvania Supreme Court and the Disciplinary Board could just as easily have approved the supervision and probation which the hearing committee recommended.

Petitioner was not tried for the usual transgression—of stealing clients' money, paying or taking a bribe, ambulance chasing at the hospital or undertakers or selling babies to adopting parents or activity that lends itself to supervision.

What kind of professional life would exist for a lawyer whose every act would be subjected to someone else's approval? Who would want him to represent them?

How could Petitioner present a client's case if he risked his own professional existence by mere filing of pleadings? *Holt v. Virginia,* 1965, 381 U.S. 131, 136, 85 S.Ct. 1375, 1378.

Therein lies the danger of what has happened here and Petitioner respectfully suggests this danger requires an exception to the "sound policy" which is only another way of saying that the state Judges know their lawyers and we are not going to second guess them.

Conclusion and Request for Relief

In effect, an unconstitutional conclusive presumption barred by *Carrington v. Rash,* 1965, 85 U.S. 775, 730, 380 U.S. 89, 96, its predecessors and progeny.

If the Court really means to define his duty according to the A.B.A. standards and the cases which discuss them, Petitioner respectfully suggests this case presents the type of problem which this Court should take under its Rule 17 and decide.

Respectfully submitted,
ALLEN N. BRUNWASSER,
Petitioner

APPENDIX

TEXT OF AMENDMENTS TO THE CONSTITUTION

Amendment [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

Amendment [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

Amendment [VIII]

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

Amendments to Constitution

Amendment [IX]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

* * *

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation the provisions of this article.

* * *

Excerpts U. S. Code

UNITED STATES CODE

* * *

CHAPTER 13—CIVIL RIGHTS

* * *

§241. Conspiracy against rights of citizens

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

June 25, 1948, c. 645, 62 Stat. 696; Apr. 11, 1968, Pub. L. 90-284, Title I, §103 (a), 82 Stat. 75.

* * *

§242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such

inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life. June 25, 1948, c. 645, 62 Stat. 696; Apr. 11, 1968, Pub. L. 90-284, Title I, §103 (b), 82 Stat. 75.

* * *

CHAPTER 19—CONSPIRACY

* * *

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Title 28 DISTRICT COURTS, JURISDICTION Ch. 85

* * *

§1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest

and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, §1, 72 Stat. 415.

§1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

* * *

28 §2201 DECLARATORY JUDGMENTS Ch. 151

* * *

§2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading,

may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, §111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85-508, §12(p), 72 Stat. 349.

* * *

§2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

* * *

§2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

* * *

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph number (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an ap-

propriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

June 25, 1948, c. 646, 62 Stat. 967; Nov. 2, 1966, Pub. L. 89-711, §2, 80 Stat. 1105.

* * *

42 §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. §1979.

* * *

42 §1985 PUBLIC HEALTH & WELFARE Ch. 21
Subchapter 1.—Generally—Continued

§1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any

person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Excerpts U. S. Code

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. §1980.

* * *

§1986. Same; action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section

1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

R.S. §1981.

* * *

CODE OF PROFESSIONAL RESPONSIBILITY

DR 7-110 Contact with Officials.

* * *

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

* * *

DISCIPLINARY ENFORCEMENT RULES

* * *

Rule 205. The Disciplinary Board of the Supreme Court of Pennsylvania

(a) The Supreme Court shall appoint a board to be known as "The Disciplinary Board of the Supreme Court of Pennsylvania" which shall be composed of eleven members of the Bar of this Commonwealth, one of whom shall be designated by the Court as Chairman and another as Vice-Chairman, and two non-lawyer electors.

(b) The regular terms of members of the Board shall be for three years, and no member shall serve for more than two consecutive three-year terms. The terms of one-third of the members of the Board, as nearly as may be, shall expire on April 1 of each year. Except when acting under Paragraph (c) (4), (6) and (7) of this rule, the Board shall act only with the concurrence of not less than seven members. Seven members shall constitute a quorum.

(c) The Board shall have the power and duty:

(1) To consider and investigate the conduct of any person subject to these rules and may initiate any such investigation on its own motion or may undertake the same upon complaint by any person.

(2) To appoint a Secretary, a Chief Disciplinary Counsel, and such assistant disciplinary counsel and staff as may from time to time be required to properly perform the functions prescribed by these rules.

(3) To appoint three or more hearing committees within each disciplinary district. Each committee shall consist of three members of the bar of this Commonwealth who maintain an office for the practice of law within that district.

(4) To assign, through its Secretary, formal charges to a hearing committee. The reviewing member of a hearing committee who has passed upon Disciplinary Counsel's recommended disposition of the matter shall be ineligible to serve on the hearing panel.

(5) To review the conclusions of hearing committees with respect to formal charges and to prepare and forward its own findings and recommendations, together with the record of the proceeding before the hearing committee, to the Supreme Court.

(6) To assign periodically the members of hearing committees within each disciplinary district to review and approve or modify recommendations by Disciplinary Counsel for dismissals, informal admonitions and institution of formal charges.

(7) To review, through a designated member, upon application by Disciplinary Counsel, a determination by a reviewing hearing committee member that a matter should be concluded by dismissal, by private informal admonition or by the institution of formal charges before a hearing committee.

(8) To privately reprimand attorneys for misconduct.

(9) To adopt rules of procedure not inconsistent with these rules. Such rules may provide for the delegation to the Chairman or the Vice-Chairman of the power

to act for the Board on administrative and procedural matters and for the delegation to the Secretary of the Board of the power to act under Paragraph (6) of this subdivision.

(10) To cause testimony relating to the conduct of formerly admitted attorneys to be perpetuated.

(11) To exercise the powers and perform the duties vested in and imposed upon the Board by law.

The Board shall, to the extent it deems feasible, consult with officers of local bar associations in the counties affected concerning any appointment which it is authorized to make under these rules.

Amended and effective March 15, 1976; amended and effective March 14, 1980; amended Sept. 22, 1980; effective 120 days after Oct. 11, 1980; amended Sept. 23, 1980, effective Oct. 1, 1980.

Rule 208 DISCIPLINARY ENFORCEMENT

Rule 208. Procedure

* * *

(b) Formal hearing. Formal disciplinary proceedings before a hearing committee shall be as follows:

(1) Proceedings shall be instituted by filing with the Board a petition setting forth with specificity the charges of misconduct.

(2) A copy of the petition shall be personally served upon the respondent-attorney.

(3) Within 20 days after such service, the respondent-attorney shall serve an answer upon Disciplinary Counsel and file the original thereof with the Board. In

the event the respondent- attorney fails to file an answer, the charges shall be deemed at issue.

(4) Following the service of the answer, if there are any issues raised by the pleadings or if the respondent-attorney requests the opportunity to be heard in mitigation, the matter shall be assigned to a hearing committee.

(5) The Board shall serve a notice of hearing upon the respondent-attorney, or upon counsel for such attorney, indicating the date and place of the hearing at least 15 days in advance thereof. The notice of hearing shall state that the respondent-attorney is entitled to be represented by counsel, to cross-examine witnesses and to present evidence in the attorney's own behalf.

(c) Hearing committee procedures. Proceedings before hearing committees shall be governed by Board rules, except that, unless waived in the manner provided by such rules, at the conclusion of the hearing the hearing committee shall submit a report to the Board containing its findings and recommendations.

* * *

RULES OF THE DISCIPLINARY BOARD

* * *

§89.1. Construction of Chapter.

This Chapter is promulgated for the purpose of assisting the Office of Disciplinary Counsel, the respondent and the Board to develop the facts relating to, and to reach a just and proper determination of, grievances brought to the attention of the Board. The Board recognizes the temptation in disciplinary matters to raise procedural defenses where substantive defenses would be unavailing and, therefore, the Board will not hold action of a hearing committee invalid by reason of any nonprejudicial irregularity, or for any error not resulting in a miscarriage of justice.

* * *

Subchapter B. THE DISCIPLINARY BOARD

§93.21. The Disciplinary Board.

* * *

§93.23. Powers and duties.

(a) *General Rule.* Enforcement Rule 17-5(c) provides that the board shall have the power and duty:

* * *

(4) To assign, through the Board Chairman, formal charges to a hearing committee.

* * *

(b) *Consultations with local bar associations.* Enforcement Rule 17-5(c) provides that the Board shall to the extent it deems feasible, consult with officers of local bar associations in the counties affected concerning any appointment which it is authorized to make under the Enforcement Rules.

* * *

Proceedings, May 2, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1561

Allen N. Brunwasser,

Plaintiff

vs.

Judge Eugene B. Strassburger III et al.,

Defendants

EXCERPT FROM PROCEEDINGS

Transcript of Excerpt from Proceedings on May 2, 1980, United States District Court, Pittsburgh, Pennsylvania before Honorable Maurice B. Cohill, Jr., District Judge.

Appearances:

On behalf of the Plaintiff: Allen N. Brunwasser, Esquire

On behalf of the Defendants: Marvin A. Fein, Assistant City Solicitor, Howland Abramson, Esquire

(2) (Proceedings began in open court at 9:15 a.m.)

THE COURT: We note Mr. Brunwasser just filed a brief in behalf of the plaintiff.

MR. BRUNWASSER: Your Honor, I have a motion I would like to make before we begin.

THE COURT: Very well.

MR. BRUNWASSER: If Your Honor please, I am going to tell you something that you already know. I have known Your Honor practically since you have been at the Bar. We had a couple of cases together, which were a pleasure, when Your Honor was a Juvenile Court Judge. I was delighted to appear before you and also here in this Court because I knew that no matter what the decision was, it would be a decision that Your Honor felt was correct. I never had any concern and I still do not.

However, I have a situation that I would like to bring to your attention.

I don't want to file a 28 United States Code 144 affidavit, but Your Honor may or may not know I am respectfully protesting the recommendation that Joseph L. Cosetti be a Bankruptcy Judge in this Court.

THE COURT: I did not know that.

MR. BRUNWASSER: Yes, and Your Honor, of course, was on the committee.

I have a letter here from Berkley Wright, the (3) Chief of the Division of Bankruptcy, indicating that I will be allowed to participate in the investigation about Mr. Cosetti.

Now I would like to tell Your Honor the things that I am going to tell the FBI so Your Honor can hear—

THE COURT: Well, yes, but Mr. Cosetti is not a party to this case, Mr. Brunwasser.

MR. BRUNWASSER: He is, Your Honor.

THE COURT: He hadn't been served.

MR. BRUNWASSER: Your Honor, that's not my fault. I filed this case and I took the notices for service and the complaints—

THE COURT: But he is still not a party.

MR. BRUNWASSER: He is a named defendant.

THE COURT: Yes, but he is not a party.

MR. BRUNWASSER: And he will—He is a named defendant.

THE COURT: But he hasn't been served.

MR. BRUNWASSER: But, Your Honor, Mr. Fein, who represents Mrs. Harris and Judge Strassburger, over my objection will also represent Mr. Cosetti.

What I am saying is—

THE COURT: He hasn't entered his appearance in behalf of Mr. Cosetti.

MR. BRUNWASSER: But, Your Honor, should I be required to bring a writ of mandamus against my friend, (4) Marshal Turner?

Whatever the reason is, if Your Honor dismisses this case, then I will go to the Marshal and I will ask them to serve Mr. Cosetti. It is the same package.

He is a Judge—will be a Judge of this Court maybe, and this Court will be asked to adjudicate a situation involving his ethics, where Your Honor has said, "We are delighted to have such a wonderful candidate come down here," and I have written information—

THE COURT: Well, I—

MR. BRUNWASSER: —that if ever anyone should not be a Judge, it should be Mr. Cosetti.

THE COURT: I think it is premature at this time even to consider him, since he has not been served.

MR. BRUNWASSER: Well, then, Your Honor, if Your Honor was going to base it—I was going to ask Your Honor to certify the matter to the Chief Justice of the United States under 28 United States Code 291 and 292 for the appointment of an out-of-District Circuit Judge to decide this case.

Now if Your Honor is going to deny the motion on the basis that Mr. Cosetti has not been served, I am going to respectfully ask Your Honor to adjourn the matter and I will then go down personally and see Marshal Turner, and I will have to say, "I'm going to lose my case," and he is going (5) to have to do something to serve the paper.

I don't know, Your Honor, why Mr. Cosetti wasn't served, but I do know and I'm sure Your Honor knows and Mr. Fein knows that he will be served; and when he is, unless Your Honor removes Mr. Fein or the Court up in the City-County Building removes him, Mr. Cosetti will be a party; and no matter how you get down to it, even if he isn't a party, Your Honor is aware that he is a named defendant, and he is one of the groups about whose conduct I respectfully object, insofar as it affects my professional reputation in this District; and there is no way to get out of it.

Your Honor knows he is a defendant. Your Honor knows if you keep the case in court, he is going to be here, and he is liable to be a sitting Judge of this District at the same time another Judge is asked to look into his conduct,

and we all know the problem; and I don't think any Judge should be required to sit in judgment of the conduct of another Judge in the same Court. I wouldn't want to do that, and I don't want to impose it on Your Honor, and I don't want to file an affidavit; and I—Frankly, I don't know how to handle it.

I want to get along with the Court. I am at the end of my career. I don't want to have any hard or strained feelings now, but I do have a problem; and I have been a lawyer 31 years, and I don't claim to be the smartest, but (6) I would have to be the dumbest not to recognize a problem.

And I have written material that I want to bring to Your Honor's attention so you will see why I object to Mr. Cosetti and what Your Honor and the other Judges of this District will have to evaluate in the FBI report with this material when it is finally submitted.

If I didn't think I had sufficient to block his appointment, I certainly wouldn't jeopardize my own neck by coming forward.

I feel that he isn't qualified professionally, temperamentally or in any way to be a Judge; and it is my respectful opinion that they are still looking around to get him a job because he had the guts to run, and it took courage to run in the mayoral election. That's my feeling.

And they couldn't get him on the PUC. I objected there; and now they are trying to get him on down here.

He never was in a court in his life. He has never had a case except when he sued a lady for not paying him installments on a washing machine, in Room 540. That was the only time.

The other time was when he was a witness before His Honor, Judge Wekselman.

In any case,—

THE COURT: Your motion is noted. It is denied, Mr. Brunwasser. Number one, it is premature. Number two, (7) he is not yet a Judge of this Court.

MR. BRUNWASSER: Yes, but Your Honor has to be aware—

THE COURT: And he won't be, if your plea stands up at the investigation.

MR. BRUNWASSER: All right. Anyway, Your Honor, is Your Honor then saying that the motion is denied for the reason that he has not been served, or that Your Honor is putting the motion in abeyance?

THE COURT: It is denied.

MR. BRUNWASSER: All right. Then I would ask Your Honor to let me put on record the reasons that I have for objecting to it, so you—

THE COURT: Well, no. You can file that in writing, Mr. Brunwasser. I have ruled on that one.

Certified a true and correct transcript of an excerpt from proceedings on May 2, 1980, before Honorable Maurice B. Cohill, Jr., District Judge.

(s) Marilyn G. Brown
Marilyn G. Brown
Official Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1561

Allen N. Brunwasser,

Plaintiff

v.

Judge Eugene B. Strassburger, III; Alexander Unkovic, Esquire; Grace S. Harris, Esquire; Joseph L. Cosetti, Esquire; Charles C. Keller, Esquire; Herbert Margolis, Esquire; Chester Byerly, Esquire; The Disciplinary Board of The Supreme Court of Pennsylvania, Allen B. Zerfoss, Esquire, Chief Disciplinary Counsel; and Edward A. Burkhardt, Esquire, Assistant Disciplinary Counsel,

Defendants.

OPINION

COHILL, D.J.

I. *Factual Background*

From 1974 to 1979 Allen N. Brunwasser, the plaintiff in this case, was the subject of a disciplinary investigation by the Disciplinary Board of the Supreme Court of Pennsylvania. During the course of this investigation, a committee was empanelled to hear the charges of unethical conduct pending against plaintiff. That committee later issued an opinion describing Mr. Brunwasser's "warrior"-like ap-

proach to legal practice and concluding that he "has played fast and loose with the legal system, bending it to his own purpose."[1] Public censure by the Supreme Court and probation were recommended to attempt to "cure [plaintiff's] apparent contempt for the law." Plaintiff responded to the opinion and recommendation by filing, *inter alia*, a "Motion to Dismiss Proceeding Because of Violation of the Doctrine of Fair Notice and Due Process of Law," in which he claimed his rights under the fifth, sixth, and fourteenth amendment were infringed, and a "Motion to Dismiss Proceedings Because of Lack of Separation of Judicial and Prosecution Functions." He reasserted his objections to the proceedings against him in a brief filed with the Disciplinary Board and at oral argument before the Board. Although the Board accepted the factual findings, it ultimately disagreed with the recommendation of the hearing committee and ordered a private reprimand of plaintiff.

In its "Report and Recommendation," the Disciplinary Board reviewed the disposition of various of plaintiff's motions, including the denial of claims of unconstitutional bias, infringement of free speech, vagueness of disciplinary rules, invidious discrimination, prejudice and inexperience of the prosecutor, and lack of due process and fair notice. "Respondent attacked everything conceivable that might be attacked." (Defendant's Exh. A. p. 15.) The Board concluded that the hearing committee had followed procedures that satisfied due process and that violations of nine Disciplinary Rules were amply established during the seven days of hearings. (Defendants' Exh. A.

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[1] All quotes from the Committee Recommendation are derived from plaintiff's complaint, pp. 24-26, and not from the original document.

pp. 7 and 16.) The Board particularly deplored plaintiff's resort to "illegal action" in filing a "patently false" suit claiming to represent someone other than himself when he actually was representing himself in order to protect his personal property. (Id. p. 15.)

Early in 1979, the case was certified to the Supreme Court of Pennsylvania. That Court affirmed the rulings of the Disciplinary Board and denied plaintiff's motion for oral argument. A petition for a writ of certiorari filed in the Supreme Court of the United States was denied.

Having exhausted all avenues of relief in the state court, but while the petition for writ of certiorari was still pending, plaintiff filed this federal action. It purports to be an action under 42 U.S.C. §§1983, 1985, and 1986; 18 U.S.C. §§241, 242, and 371; 28 U.S.C. §2201,[2] 2254 and 1343(3); and under the first, fifth, eighth, ninth and fourteenth amendments to the United States Constitution. Plaintiff has also moved to amend to assert jurisdiction under 28 U.S.C. §1331. Among those named as defendants are three individuals who complained to the Disciplinary Board about plaintiff's conduct or who were called as witnesses at the hearing, the Disciplinary Board itself, its chairman, its chief and assistant counsel, a review officer, and the members of the hearing committee that was empanelled to hear the charges against the plaintiff. The complaint incorporates by reference all the objections that were made before the Disciplinary Board of the Supreme Court (¶ J., p. 44). Relief requested by the complaint is

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[2] Plaintiff cites 28 U.S.C. §2221 in ¶1 of his complaint, but because he later describes this section as providing authority for declaratory relief we assume he means §2201.

"limited" to declaratory and injunctive relief. Among the orders sought are an injunction against defendants "so that what has happened will not happen again," an order requiring defendants "to undo the damage they have occurred and not to participate in similar conduct in the future," a declaration that the Disciplinary Board's chief counsel should no longer be permitted to prosecute cases, and a complete investigation into the state proceedings against plaintiff. At oral argument, plaintiff also requested that the defendants be enjoined from publishing or distributing copies of the confidential opinion and recommendation of the hearing committee.[3] The pith of the action is probably best articulated on the required summary form attached to the complaint (form JS-44a) wherein plaintiff explained that "[h]e respectfully asks that a private reprimand given by the State Disciplinary Board be revoked."

All defendants, citing numerous grounds, have moved to dismiss the complaint under Fed. R. Civ. P. 12(b).

II. *Jurisdiction*

The defendants have asserted that this Court is without subject matter jurisdiction to hear this case.

Although the myriad claims raised by the plaintiff in his complaint were viewed as "many novel theories relating to the practice of law" when they were raised before the hearing committee and again before the Disciplinary Board (Defendant's Exh. A p. 15), he is not alone in turning to federal court for relief from an adverse state disci-

[3] Plaintiff, however, has made that opinion a matter of public record by incorporating it into his complaint.

plinary action. Many frustrated attorneys, as well as many disappointed bar applicants, have taken their causes to the federal district courts. In most of these cases the federal courts have been reluctant to interfere with the operations, or alter the results, of state bar proceedings. A body of case law is emerging from decisions of several of the circuit courts of appeal which, at least in part, supports the defendants' position that this Court lacks jurisdiction.

A 1969 decision of the Court of Appeals for the Ninth Circuit, responding to a lawyer's action seeking to enjoin his suspension from practice by the Alaska Supreme Court, took a straightforward approach to the jurisdictional issue. In *MacKay v. Nesbett,* 412 F.2d 846 (9th Cir. 1969), cert. denied 296 U.S. 960 (1970), the *per curiam* opinion stated:

> [O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court, and not by means of an original action in a lower federal court. The rule serves substantial policy interests arising from the historical relationship between state judicial systems and the members of their respective bars, and between the state and federal judicial systems. We are persuaded that it is sound.

412 F.2d at 846.

Two years after *McKay,* the Eighth Circuit confronted a similar jurisdictional question in a §1983 suit by an unsuccessful bar applicant. The plaintiff in *Feldman v. State Board of Bar Examiners,* 438 F.2d 699 (8th Cir. 1971), challenged the Arkansas testing procedures, claiming he

was discriminated against on the basis of his religion and mental disability, and asked the federal court to review his test to determine if he had, in fact, passed. The district court dismissed Feldman's complaint as premature since he had not sought review in the state supreme court prior to instituting his federal action. In affirming, however, a panel of the Eighth Circuit held that the district court was permanently rather than temporarily unable to hear the suit: the plaintiff's *only* remedy was in pursuing his claim to the state's highest court and thereafter to the United States Supreme Court on a petition for certiorari. The circuit court explained, "[a]s the trial court properly stated, it is not an appellate court and cannot in such a case as this review state court actions." 438 F.2d at 704. However, the *Feldman* decision was complicated by the fact that the circuit court, while discussing jurisdiction, did also reach the merits of plaintiff's claims. It distinguished the plaintiffs' case from other cases stating legitimate constitutional claims:

> Undoubtedly, could plaintiff show an invidious and purposeful effort to discriminate against him or perhaps an actual discrimination even without such an intent, on any of the grounds he specifies or on any other grounds such as fraud, he well might assert a violation of his constitutional rights. There is little question but that an applicant for admission to the bar as an attorney is entitled to both substantive and procedural due process and equal protection guaranteed by the Fourteenth Amendment.

438 F.2d at 703. Thus the door of the federal district court was closed to some, but not all, disappointed bar applicants.

A subsequent Tenth Circuit decision, although not discussing *Feldman* or *McKay*, offered some analytical explanation for the jurisdictional dilemma. *Doe v. Pringle*, 550 F.2d 596, 597 (10th Cir. 1976), cert. denied 431 U.S. 916 (1977), recognized a "subtle but fundamental distinction" between two types of claims that might be brought against a state board of bar examiners [or disciplinary board]: (1) a constitutional challenge to the state's rules and regulations governing admission [or discipline], and (2) a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission. Although federal courts do exercise jurisdiction over constitutional challenges to rule-making authority or administration of rules, the same is *not* true where a plaintiff seeks district court review of a state court's decision in a particular case. "[T]he latter claim may be heard, if it all, exclusively by the Supreme Court of the United States." 550 F.2d at 597. *Doe v. Pringle* seems to stand for the proposition that an allegation of ongoing unconstitutional procedure by a state board licensing or disciplining lawyers will land a plaintiff in the district court while an attack on a particular result will not. The difficult question remaining is how to respond to a complaint embodying both claims or using one to bolster the other.

Two 1977 circuit opinions continued the trend of upholding state adjudications, but on different rationale. In *Richardson v. McFadden*, 563 F.2d 1130 (4th Cir. 1977) (en banc), *cert. denied* 435 U.S. 968 (1978), several black law school graduates who had failed the South Carolina bar examination brought a federal action for declaratory and injunctive relief. After a hearing, the district court denied relief. A panel of the Fourth Circuit reversed as to some of the plaintiffs, finding evidence of arbitrary and

capricious action, and directed that they be certified as having passed the exam. 540 F.2d 744 (4th Cir. 1976). On rehearing *en banc*, the majority decided the case substantively against all the plaintiffs, finding insufficient proof of unconstitutional discrimination. However, the concurring opinion of three judges would have held that the district court was without subject matter jurisdiction. They believed that the Fourth Circuit should have followed the teachings of the Eighth, Ninth, and Tenth Circuits in *Feldman, McKay,* and *Doe*—that review lies exclusively in the United States Supreme Court—and would have dismissed the instant claims without reaching the merits.

In *Grossgold v. Supreme Court of Illinois,* 557 F.2d 122 (7th Cir. 1977), a panel of the Seventh Circuit reached the conclusion that the *Richardson* concurrence urged. Affirming the dismissal of a case brought by an attorney who was suspended from practice for a felony conviction despite a presidential pardon, the court relied on several of the cases discussed above. Thus, the panel concluded that "plaintiff pursued his proper remedy in the Supreme Court of Illinois and subsequently in the Supreme Court of the United States and is bound by the adverse result." 557 F.2d at 125. The plaintiff's argument in support of district court jurisdiction was rejected:

> He asserts that there was jurisdiction because otherwise there would be no judicial forum to pass upon his federal constitutional claim that the three-year suspension granted by a state "administrative agency" unconstitutionally interfered with the presidential pardon . . . If no court could review the constitutional question, the alleged constitutional deprivation could be redressed in district court under the

> Section 1343(3) subject matter jurisdiction grant. If indeed judicial review of a claimed constitutional deprivation were cut out entirely, grave constitutional problems would be posed . . . The flaw in plaintiff's contentions is that it overlooks the judicial review already accorded him. The Illinois Supreme Court, which is fully competent to pass on federal constitutional questions, has passed upon this constitutional question, and its decision became final when the Supreme Court of the United States denied certiorari. Since the Illinois Supreme Court was bound to pass on the constitutional question posed by the pardon, the court's denial of Grossgold's petition for reconsideration necessarily implied that the constitutional question was being decided against the plaintiff. Consequently, there was no arguable constitutional "deprivation" . . . The doctrine of *res judicata* bars any further litigation of this question.

557 F.2d at 124-125 (citation omitted).

A very recent Florida district court case, *Kimball v. Florida Bar,* 465 F. Supp. 925, 927 (S.D. Fla. 1979), agreed with those circuit court cases holding that state bar procedures for screening or disciplining attorneys are subject to constitutional review only by the United States Supreme Court on writs of certiorari to state supreme courts. District Judge Roettger also noted that two earlier Supreme Court cases in which bar procedures were substantively scrutinized for constitutional flaws, *Konigsberg v. State Bar of California,* 353 U.S. 252 (1957), and *Schware v. Board of Bar Examiners of State of New Mexico,* 353 U.S. 252 (1957), were cases which reached the Supreme Court directly from state supreme courts.

The parties have directed us to no Third Circuit decision which is directly on point on the jurisdictional issue, nor has our own research uncovered one.[4] After review of the cases discussed above, we have concluded that the distinction developed between suits challenging unconstitutional procedures and suits challenging specific results is very difficult to implement. A better approach would be a universal rule which provides that the *only* route for vindication of constitutional challenges to state bar disciplinary procedures is by appeal to the state's highest court and subsequent petition for writ of certiorari. This appears to be the current law in the Seventh and Ninth Circuits. *See Grossgold* and *McKay, supra.*

In the instant case, plaintiff has attempted to avoid the adverse results of the proceedings before the Disciplinary Board, the refusal of the Pennsylvania Supreme Court to reconsider the matter, and the denial of certiorari by the United States Supreme Court, by restating his challenges as a civil rights suit. What he obviously wants, however, is a *reversal* of the reprimand given him by his professional peers in the Commonwealth of Pennsylvania. We believe that we lack jurisdiction to reopen the case against him in the guise of a civil rights action. This holding disposes of plaintiff's claims under 42 U.S.C. §§1983, 1985 and 1986, 28 U.S.C. §§2201 and 1343 (3), and under the various constitutional amendments. Plaintiff's allegations of jurisdiction under 18 U.S.C. §§241, 242 and 371 (criminal conspiracies) and under 28 U.S.C. §2254 (habeas corpus for those in state custody) are clearly frivolous, if not irresponsible, and need not be addressed.

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[4] We anticipate, however, that the Third Circuit will soon have an opportunity to consider the matter.

III. *Res Judicata—Collateral Estoppel*

For the sake of argument and judicial economy, we also will reach the defendant's substantive argument. One issue clearly transcends and requires dismissal of this suit: the preclusive effect of the prior state judgment.

Several of the cases that we reviewed earlier seem to treat the topics of jurisdiction and *res judicata* as one. *E.G., Grossgold, supra,* 557 F.2d at 125. Although both lead to the same result, we believe they are independent legal questions.

Res judicata and collateral estoppel were both asserted by defendants during oral argument. Both doctrines are intended to avoid repetitious litigation and assure the finality of judgments. Because the prior litigation in this case took a different form and fewer parties were involved, it might be argued that *res judicata* is technically inapplicable. However, collateral estoppel—issue preclusion—is clearly applicable in a case where we have diligently searched for an issue currently raised that was not raised and vigorously pursued in the prior action.

In addition to the usual purposes of collateral estoppel—economy, finality, and reliance—that militate against rehearing the same claims, considerations of comity are also present here. A recent legal commentary suggests that allowing plaintiffs to impeach state court judgments through civil rights actions would deny state courts the ability to decide with finality questions within their jurisdiction and would hinder the states in enforcing their laws; "only if one believed that state courts were systematically either unwilling or unable to enforce federal constitutional rights could such costs be justified." Note, *Developments in the Law—Section 1983 and Federalism,* 90 Harv. L.

Rev. 1133, 1336, (1977). Although the plaintiff here seeks injunctive as well as declaratory relief, and we have stated the problem in terms of collateral estoppel rather than *res judicata,* what is clearly at stake is the integrity of the reprimand which was authorized by the Supreme Court of Pennsylvania and left undisturbed by the denial of certiorari.

New Jersey Educ. Ass'n v. Burke, 579 F.2d 764 (3d Cir. 1978), *cert. denied* 439 U.S. 894 (1978), relied upon by plaintiff, is distinguishable and is, in fact, more helpful to his opponents. In *Burke,* the Third Circuit reviewed a district judge's abstention from a §1983 action in deference to a pending state civil proceeding in which the plaintiffs had "at least some prospect of vindicating their constitutional rights." Reversing, the court of appeals discussed the principles behind abstention and a court's duty to balance federal and state interests. Since the federal suit was a class action challenging on constitutional grounds new regulations of the New Jersey Board of Education and the pending state proceeding was a statutory appeal, Judge Adams wrote that "[n]either the traditional equitable aversion toward intermeddling in criminal processes, nor the state's interest in enforcing its laws in its own forum is present." 579 F.2d at 768. Although the state proceedings involved in the instant case were not criminal in the usual sense, they invoke our hesitancy to intermeddle since they so clearly involve a matter vital to the effective operation of the state court system; moreover, our interference would reduce the ability of the Pennsylvania Supreme Court to enforce its disciplinary rules.

The *Burke* court went on to consider whether the pending and parallel state action would have an effect on the federal action. After reviewing significant appellate de-

cisions, Judge Adams acknowledged that "a restrictive concept to the right to a federal forum has significant advantages," such as discouraging vexatious litigation and conserving judicial resources. 579 F.2d at 774. *Burke* ultimately held that a state court judgment forecloses a §1983 litigant from raising grievance in federal court only if such claims have been pressed before, and decided by, a state tribunal. *Id.* Or, as the United States Supreme Court said in an earlier abstention case, "we see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the district court." *England v. State Board of Medical Examiners,* 375 U.S. 411, 419 (1964). In the case before us plaintiff clearly and unreservedly pursued his constitutional claims before the state board and the state's highest court. We think it makes no difference that plaintiff was not a voluntary party in the state proceedings since he did voluntarily press his constitutional claims there as well as in his petition for certiorari.

We recognize that the state of the law regarding the preclusive effect of prior state judgments on §1983 cases "teem[s] with inconsistencies." *See Burke,* 579 F.2d at 773, n. 48, and cases cited therein. *See also* Comment, Res Judicata and Section 1983: the Effect of State Court Judgments on Federal Civil Rights Actions, 27 U.C.L.A. Law Rev 177, 182-196 (1979). However, we believe that the kind of repetitious, vexatious, and wasteful litigation feared by both the Supreme Court and the Third Circuit could not be better exemplified than by the suit before us.

Believing not only that comity requires us to avoid reopening a state disciplinary proceeding, but also that Mr.

Brunwasser is bound by the rulings on the constitutional claims which he pursued in every way possible before the state tribunal, we must dismiss this suit. We need not reach the numerous other issues raised by the defendants.

IV. *Other Motions*

Plaintiff's Motion to Amend, adding an allegation of jurisdiction under 28 U.S.C. §1331 and a claim of damages in excess of $10,000 will be granted; however, that claim must be dismissed since all the claims asserted in the complaint have succumbed to parts II and III of this opinion.

Plaintiff's Motion to have Circuit or Other Judge Appointed to Adjudicate this Matter will be denied as it was denied when earlier raised at oral argument. Besides being moot, the matters raised therein are totally irrelevant to this action.

An appropriate order follows.

(s) Maurice B. Cohill, Jr.
United States District Judge

Opinion, District Court
Order, May 29, 1980

ORDER

[Caption Omitted]

AND NOW, this 29th day of May, 1980, consistent with the preceding opinion, IT IS ORDERED, ADJUDGED, and DECREED that (1) Plaintiff's Motion to Amend BE and the same hereby is GRANTED: (2) Plaintiff's Motion to have Circuit or Other Judge Appointed to Adjudicate this Matter BE and the same hereby IS DENIED; and (3) The Motions of all Defendants to Dismiss this action BE and the same hereby ARE GRANTED.

(s) Maurice B. Cohill, Jr.
United States District Judge

Memorandum Order, June 2, 1980

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1561

Allen N. Brunwasser,

Plaintiff,

v.

Judge Eugene B. Strassburger, III; Alexander Unkovic, Esquire; Grace S. Harris, Esquire; Joseph L. Cosetti, Esquire; Charles C. Keller, Esquire; Herbert Margolis, Esquire; Chester Byerly, Esquire; The Disciplinary Board of the Supreme Court of Pennsylvania, Allen B. Zerfoss, Esquire, Chief Disciplinary Counsel; and Edward A. Burkhardt, Esquire, Assistant Disciplinary Counsel,

Defendants.

MEMORANDUM ORDER

This Order is being entered to clarify the record in this case.

Joseph L. Cosetti was named as a defendant in this case, but had not been properly served when motions to dismiss were filed nor when oral argument was heard. However, counsel for the City of Pittsburgh argued on his behalf, asserting entitlement to dismissal on the merits as well as lack of personal jurisdiction. On May 16, 1980, Mr. Cosetti was served with notice of this suit. On

Memorandum Order, June 2, 1980

May 29, 1980, this Court entered an opinion and order, dismissing this action as to all defendants. One day later a Motion to Dismiss was filed on behalf of Mr. Cosetti. To avoid any confusion or misunderstanding an order will be entered dismissing the action as to Mr. Cosetti individually. The same reasons for dismissal outlined in the May 29 opinion—lack of subject matter jurisdiction and collateral estoppel—apply to the claims against Mr. Cosetti.

Therefore, now, this 2nd day of June, 1980, consistent with this Court's opinion of May 29, 1980, IT IS ORDERED that the Motion to Dismiss filed on behalf of Joseph L. Cosetti BE and the same hereby IS GRANTED.

/s/ Maurice B. Cohill, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1561

Allen N. Brunwasser,

Plaintiff,

v.

Judge Eugene B. Strassburger, III; Alexander Unkovic, Esquire; Grace S. Harris, Esquire; Joseph L. Cosetti, Esquire; Charles C. Keller, Esquire; Herbert Margolis, Esquire; Chester Byerly, Esquire; The Disciplinary Board of the Supreme Court of Pennsylvania, Allen B. Zerfoss, Esquire, Chief Disciplinary Counsel; and Edward A. Burkhardt, Esquire, Assistant Disciplinary Counsel,

Defendants.

ORDER

AND NOW, to-wit, this 11th day of June, the Court having received plaintiff's Motion for Reargument and Reconsideration of the Court's Orders of May 29, 1980 and June 2, 1980, granting the motions of defendants to dismiss, IT IS HEREBY ORDERED, ADJUDGED and DECREED that plaintiff's specific request that his motion be scheduled for oral argument be and the same here-

by is DENIED, and IT IS FURTHER ORDERED, ADJUDGED and DECREED that the plaintiff's Motion for Reargument and Reconsideration is DENIED.

Plaintiff also added the following handwritten notation to his Motion for Reargument and Reconsideration:

> Plaintiff also respectfully requests an evidentiary hearing on the 6/5/80 motion filed by Mr. Fein at which proceeding the background of his representation can be investigated and his word proved by live evidence subject to cross examination. Plaintiff will not be satisfied by mere denial of the motion.

We have no record of a motion filed in this case on June 5, 1980, by Mr. Fein. If plaintiff is referring to the Motion to Dismiss filed on May 30, 1980 by Marvin A. Fein in behalf of Joseph L. Cosetti, that motion was granted in our order of June 2, 1980, and as stated previously herein, plaintiff's Motion for Reargument and Reconsideration is denied.

By this Order we intend to lay this case to rest, unless otherwise instructed by the United States Court of Appeals for the Third Circuit or the United States Supreme Court.

/s/ Maurice B. Cohill, Jr.
United States District Judge

Order, June 17, 1980

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1561

Allen N. Brunwasser,

Plaintiff,

v.

Judge Eugene B. Strassburger, III; Alexander Unkovic, Esquire; Grace S. Harris, Esquire; Joseph L. Cosetti, Esquire; Charles C. Keller, Esquire; Herbert Margolis, Esquire; Chester Byerly, Esquire; The Disciplinary Board of the Supreme Court of Pennsylvania, Allen B. Zerfoss, Esquire, Chief Disciplinary Counsel; and Edward A. Burkhardt, Esquire, Assistant Disciplinary Counsel,

Defendants.

ORDER

In the "paper chase" that this case has become, several missives have passed one another in a confusing sequence. This Order, we hope, will finally clarify the record.

On May 29, 1980, this Court entered an Order dismissing this action as to all defendants. That Order crossed in the mails with a Motion to Dismiss of one of the defendants for whom dismissal had been substantively argued

although he was not technically a party at the time of oral argument; this Motion to Dismiss was granted in a Memorandum Order of June 2, 1980. The case was thereafter considered "closed." On June 5, 1980, plaintiff filed a Motion for Reargument and Reconsideration, to which he added a hand-written note concerning a motion filed by the defendants on June 5, 1980; apparently he received a copy of that motion just prior to filing his own. The Court, however, received no such motion from defendants on June 5, 1980 and, finding plaintiff's motion to be without merit, prepared an order denying it. This Order of Court was entered June 11, 1980, after a Motion for Reasonable Counsel Fees was filed with the clerk by defendants on June 6, 1980 but before such motion reached this judge's chambers. (This, apparently, was the motion referred to by the plaintiff in his handwritten note.) Our June 11th Order prematurely—perhaps wishfully—expressed an intent to "lay this case to rest." After that June 11th Order was filed but before it reached the plaintiff, he had filed a "Citation of Additional Case Law and Request for Reconsideration and Reargument."

We now have two open motions. The plaintiff's Request for Reconsideration and Reargument will be denied, as will the request therein for further oral argument on this matter. Defendants' Petition for Attorney's Fees is premature in light of the pending action brought by plaintiff challenging the propriety of the defendants' representation, *Brunwasser v. Mulvihill,* CA 80-557, remanded to the Court of Common Pleas by this Court on May 29, 1980. So long as that action is viable, we shall decline to consider the question of attorney's fees pursuant to 42 U.S.C. §1988.

Order, June 17, 1980

Therefore, now, this 17th day of June, 1980, IT IS ORDERED that Plaintiff's Motion for Reargument and Reconsideration BE and the same hereby IS DENIED; and Defendants' Petition for Reasonable Counsel Fees BE and the same hereby IS DENIED without prejudice.

/s/ Maurice B. Cohill, Jr.
United States District Judge

Order, July 23, 1980

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 79-1561 F

Allen N. Brunwasser

vs.

Judge Eugene B. Strassburger III et al

ORDER

AND NOW, to wit, July 23, 1980, IT IS ORDERED that all of plaintiff's motion filed July 22, 1980 be denied in view of Judge Cohill's Order of June 11, 1980.

/s/ William W. Knox
William W. Knox, U.S.D.J.
Acting as Miscellaneous Judge in place of Judge Cohill.

CC: Counsel of record

OPINIONS AND ORDERS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2103

Allen N. Brunwasser,

Appellant.

v.

Judge Eugene B. Strassburger, III; Alexander Unkovic, Esquire; Grace S. Harris, Esquire; Joseph L. Cosetti, Esquire; Carl E. Glock, Jr., Esquire; Charles C. Keller, Esquire; Herbert Margolis, Esquire; Chester H. Byerly, Esquire; The Disciplinary Board of the Supreme Court of Pennsylvania; Allen B. Zerfoss, Esquire, Chief Disciplinary Counsel; and Edward A. Burkhardt, Esquire, Assistant Disciplinary Counsel

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Appeal from the United States District Court for the Western District of Pennsylvania (D.C. Civil No. 79-01561)

Submitted Under Third Circuit Rule 12 (6)
February 10, 1981

Judgment Order, Court of Appeals

Before: ALDISERT, HIGGINBOTHAM, *Circuit Judges,* and LACEY,* *District Judge.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,
A Leon Higginbotham, Jr.
Circuit Judge

Attest:
Sally Mrvos
Sally Mrvos, Clerk

Dated: Feb 13, 1981

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*Honorable Frederick B. Lacey, United States District Court for the District of New Jersey, sitting by designation.

Order, April 3, 1981

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 80-2103

Allen N. Brunwasser,

Appellant

v.

Judge Eugene B. Strassburger, III; Alexander Unkovic, Esquire; Grace S. Harris, Esquire; Joseph L. Cosetti, Esquire; Carl E. Glock, Jr., Esquire; Charles C. Keller, Esquire; Herbert Margolis, Esquire; Chester H. Byerly, Esquire; The Disciplinary Board of the Supreme Court of Pennsylvania; Allen B. Zerfoss, Esquire; Chief Disciplinary Counsel; and Edward A. Burkhardt, Esquire, Assistant Disciplinary Counsel

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SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*, and LACEY*, *District Judge*.

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*Honorable Frederick B. Lacey, United States District Court for the District of New Jersey, sitting by designation.

Order, April 3, 1981

The petition for rehearing filed by ALLEN N. BRUNWASSER, appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
A Leon Higginbotham, Jr.
Circuit Judge

Dated: April 3, 1981